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No. 84-934 (2)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RICHARD R. BERGERON,
Petitioner,

v.

NACKEY S. LOEB, Executrix of the
Estate of William Loeb, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Respondent believes petitioner did not correctly state the issue. This is not a case of diversity where Bergeron chose to bring suit in federal court in the same state where the probate was pending. He brought his suit in New Hampshire, not in Nevada. Petitioner's statement of the question does not disclose that Bergeron's suit was brought in New Hampshire.

In respondent's view, the questions presented are:

1. Is NRS 107.130 unconstitutional in requiring that when a claim against a decedent's estate has been filed in the district court in the State of Nevada, and is rejected by the Executrix, any suit to enforce that claim must be brought in the district court in Nevada, not in federal court in New Hampshire.

Note: While the Nevada Supreme Court held that the Nevada district court was the proper court, this was in the context of the suit having been filed in New Hampshire. The question of a suit in federal court in Nevada under diversity was not at issue.

2. Whether the constitutional question now presented was timely and properly raised in the courts below.

3. Whether the issue presented by this case is of sufficient importance to warrant review by this Court.

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Estate of William Loeb, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Nackey S. Loeb, Executrix of the Estate of William Loeb, deceased, respectfully prays that the Petition for Certiorari be denied.

OPINIONS BELOW

September 17, 1982: Order, Second Judicial District Court of the State of Nevada — petitioner's Appendix C.

September 29, 1982: Judgment, Second Judicial District Court of the State of Nevada — petitioner's Appendix D.

January 25, 1984: Opinion, Supreme Court of the State of Nevada, petitioner's Appendix A.

October 4, 1984: Order Denying Rehearing, Supreme Court of the State of Nevada, petitioner's Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Nevada Revised Statutes:

> 147.040. Filing of claims: Must be filed within 90 days.
>
> 1. All persons having claims against the deceased must, within 90 days after the first publication of the notice specified in NRS 147.010, file the same, with the necessary vouchers, with the clerk of the court, who shall file and register each claim.
>
> 147.130. Rejection of claim; notice; time to file suit; service of summons; removal of executor or administrator for default.
>
> 1. When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder must be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice, whether the claim is due or not; otherwise the claim is forever barred. If the holder of a claim resides out of the county, he may be informed of the rejection of his claim by written notice forwarded to his post office address by registered or certified mail.

U.S. Constitution, Article VI:

> * * *
>
> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

> Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> * * *

28 USC Sec. 1332:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States; . . . .

STATEMENT OF THE CASE

The Nevada statute requires that a claim against a decedent's estate be filed in the District Court for the county where the estate is being probated.

If the claim is rejected, the statute requires that suit to compel payment be brought "in the proper court." NRS 147.130. The Estate argued, and the Nevada Supreme Court held, that the legislative intent of the statute was for suit to be brought in the court in which the probate was pending.

In the instant case, Bergeron had actual notice of the probate, and did in fact file a Claim, respondent's Appendix A, on time, in the court where the probate was pending, that is, in the Second Judicial District Court of Nevada, in and for the County of Washoe. The claim was filed *with the court*, not merely presented to the executrix, as petitioner stated. His Claim was rejected, and he had actual notice of rejection. He thereafter did not file suit in the Second Judicial District Court of the State of Nevada, or in the United States District Court for the State of Nevada, but instead, filed suit in New Hampshire, in the United States Court for the District of New Hampshire.

The Nevada court, both the Second Judicial District Court, and, on appeal, the Nevada Supreme Court, held that the filing in New Hampshire did not constitute bringing suit in the proper court as required by NRS 147.130, and therefore the Creditor's Claim against the Estate was forever barred.

It is to be noted that the question of whether Bergeron might have filed in the United States District Court for the District of Nevada, not in New Hampshire, is not an issue in this case. He did not file in Nevada; he filed in New Hampshire.

The Estate was not probated in New Hampshire. Neither Mr. nor Mrs. Loeb were residents of New Hampshire; Mrs. Loeb was personally served in New Hampshire; the Estate owned no property in New Hampshire.

The Union Leader Corporation is a New Hampshire corporation. All of the stock of the corporation was pledged to the Security Bank of Nevada as security for a loan made to the corporation; it was physically situated in the vault of the bank at Reno, Nevada. The stock was and is owned by Nackey S. Loeb, Trustee of The William Loeb Union Leader Trust, an Intervivos Trust, over which the State of Nevada has and has exercised in rem jurisdiction. Case No. 82-5478, Second Judicial District Court of the State of Nevada.

It is not material to the issue before this Court, but respondent must take exception to petitioner's assertion that William Loeb reneged on a promise to his employees. Such is only petitioner's contention. Respondent's contention is that Mr. Loeb and his wife, the executrix herein, decided of their own free will that after the death of the last of them to survive, and of their named trustees, the stock of the newspaper would be distributed to the then-employees of the newspaper. This was published in a front-page editorial in the newspaper on May 19, 1978,

and a copy, from page 153 of the Record on Appeal, is attached as Appendix B to this brief.

On October 12, 1984, the United States District Court for the District of New Hampshire entered Judgment against plaintiff Bergeron upon his suit in that court. Appendix C. Bergeron's motion for reconsideration of that judgment has been denied. Appendix D.

ARGUMENT

I

IS THE ISSUE PRESENTED BY THIS CASE DESERVING OF CERTIORARI?

Under Supreme Court Rule 17, review is to be granted only when there are special and important reasons therefor.

The issue presented by this case will never be raised again, for no one who has filed a claim in a Nevada probate would ever hereafter fail to file suit in Nevada. Indeed it is puzzling why this claimant, having had actual knowledge of the Nevada probate, and having filed his claim in the Nevada probate, and having had Nevada counsel, did not file suit in the Nevada court. Neither Mr. nor Mrs. Loeb resided in New Hampshire, and there is no claim that they did. Nor did they have property in New Hampshire. The issue presented is not of importance to warrant review by the United States Supreme Court.

Petitioner addresses this issue by stating the decision of the Nevada Supreme Court has already begun to wreak constitutional havoc. Translation: petitioner lost in New Hampshire. Requiring a claimant to follow his claim with a suit in the same forum would not create havoc, nor is it even significant.

II

THE CONSTITUTIONAL ISSUE NOW PRESENTED WAS NOT TIMELY AND PROPERLY RAISED BEFORE THE NEVADA SUPREME COURT

Supreme Court Rule 21.1(h) requires petitioner to specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions were raised, with specific references "as will show that the federal question was timely and properly raised."

The issue before the Supreme Court of Nevada was of statutory construction: Whether the Nevada Legislature intended suit upon a claim filed in the district court, and rejected, to be filed in the district court, or whether it might be filed anywhere, such as in New Hampshire. Bergeron's brief to the Nevada Supreme Court did not cite the supremacy clause of the U.S. Constitution. Bergeron did not challenge the constitutionality of the Nevada statute. Bergeron did argue that the New Hampshire federal court was the proper court to bring suit, and cited cases in support thereof, which were cases where the suit in the federal court was brought in the same state as where the probate proceeding was pending. Bergeron argued that holding New Hampshire was not the proper court would divest it of jurisdiction—but he did not specifically argue that the Nevada statute was unconstitutional. This court can read the original Opinion of the Nevada Supreme Court and decide for itself whether or not the issue of constitutionality was raised.

As to the additional challenge now being made to the Nevada statute, that a federal court would have exclusive jurisdiction over a 15 U.S.C. Sec. 78aa action, the Nevada Supreme Court in its order denying rehearing, noted that this issue (constitutional or not) was being raised for the first time in the petition for rehearing, and was contrary to the position asserted in Bergeron's brief. Also, that

Bergeron had failed to present that argument to the Nevada district court.

(The securities issue itself is a sham issue on the facts of this case. It is not a Securities Exchange Act case. The New Hampshire court entered a Summary Judgment against the securities claim, even assuming all contentions of plaintiff to be true. The complaint, read as a whole, shows there was no "purchase or sale" of stock, without which the act is not applicable. Bergeron's Creditor's Claim filed in the Nevada district court, respondent's Appendix A, does not make a securities claim.)

Petitioner has not shown he raised constitutional issues in the court below. Even his appendix is an excerpt from his trial court memorandum, not from his supreme court brief.

III

THE NEVADA PROBATE STATUTE IS NOT UNCONSTITUTIONAL

Is it unconstitutional for Nevada to provide that when a creditor's claim is filed against a Nevada estate, and rejected, any suit brought to enforce payment of that claim must be brought in Nevada?

Bergeron filed his creditor's claim in the Nevada probate. He thereby submitted himself to the jurisdiction of the Nevada court.

Rauser v. Rauser, 52 Wis. 2d 665, 190 N.W.2d 875 (1971)

A copy of Bergeron's claim is attached to this brief as Appendix A. Bergeron had actual knowledge of the probate. He filed his claim on time. He had actual knowledge of the rejection of his claim. He did not file

suit in Nevada; he filed suit in New Hampshire on the 63rd day after notice of rejection was mailed.[1]

The public policy of the State of Nevada is that estates in probate be administered and distributed efficiently and expeditiously. This has been declared by statute and judicial decision, and is repeated in the opinion of the Nevada Supreme Court:

> "NRS 147.130(1) is part of Title 12 of the Nevada Revised Statutes, relating to wills and Estates of Deceased Persons. The entire statutory scheme set out in Title 12 demonstrates an intention on the part of the legislature to ensure the speedy and certain distribution of decedent's estates. For example, NRS 143.035 requires that an executor or administrator use reasonable diligence in administering an estate. It further requires him to file a report with the court explaining why the estate has not been closed within six months of his appointment if no federal tax return need be filed for the estate, and within eighteen months if a tax return is required. Subsection 4(c) of this statute provides for revocation of the letters of an executor or administrator who has not used reasonable diligence in the administration of an estate." Opinion, Petitioner's Appendix, page 5.
>
> * * *
>
> "As we stated in Gardner Hotel Supply v. Estate of Clark, 83 Nev. 388, 391, 432 P.2d 495, 497 (1967): 'The spirit and letter of Nevada statutes relating to the filing of claims and administration of estates speak to the policy of our laws that efficient and expedient administration is essential.' " Ibid, page 6.

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[1] The trial court also held that the suit was not timely. The Nevada Supreme Court, without discussion, stated that the claim had been filed within the requisite 60-day period.

Realistically, if a suit on a claim filed in a Nevada estate proceeding can be brought wherever the executrix can be personally served, New Hampshire, New Jersey, New York, New Mexico, or anywhere, Nevada is denied the right to efficiently and expeditiously distribute decedent's estates. The Nevada Supreme Court in its opinion said:

> "It is difficult to conceive of a less efficient method of administering an estate than to require the Nevada district court having jurisdiction over the assets of an estate to await the final adjudications, including appeals, of any number of other courts that may be considering matters which could materially and adversely affect Nevada's established authority to proceed." Ibid, page 8.

Nevada acquired jurisdiction over Bergeron in this cause March 17, 1982, when Bergeron filed his claim in the Nevada court. *Rauser v. Rauser,* supra.[2] This was long before Bergeron filed suit in New Hampshire. The Nevada Supreme Court cited *Kline v. Burke Const. Co.,* 260 U.S. 226, 229 (1922), and quoted from that opinion with part of the quotation being:

> "The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction." Petitioner's Appendix, page 10.

Petitioner complains that the Nevada statute as construed by the Nevada Supreme Court "diminishes" the jurisdiction of the federal court in New Hampshire. Yet the Nevada trial court, and the Nevada Supreme

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[2] Failure to file suit upon a claim filed and rejected in Nevada barred subsequent suit in Wisconsin on issues which might have been litigated in the Nevada Probate Court, 190 N.W. 2d 875, 878 (1971).

Court, both said they did not purport to determine the jurisdiction of the New Hampshire court.

The Nevada trial court said:

> "This Court does not purport to decide the jurisdiction of the United States District Court in this matter, but instead only finds today the Federal action brought in New Hampshire was not timely and was the improper forum to assert relief from the denial." Petitioner's Appendix, page 22.

The Nevada Supreme Court said:

> "Although we cannot, and do not, decide the propriety of the New Hampshire federal court's exercise of jurisdiction, we do conclude that appellant's action was not brought in 'the proper court' as required by NRS 147.130(1)." Petitioner's Appendix, page 13.

The New Hampshire court said:

> "The denial of the temporary restraining order is not indicia that this court is ruling that it does not have jurisdiction in this case." Petitioner's Appendix, page 101.
>
> * * *
>
> "The court opines that on the state of the pleadings now before it this court has jurisdiction." Petitioner's Appendix, page 103.

The New Hampshire court since exercised jurisdiction by entering judgment against Bergeron and in favor of respondent. Reconsideration has been denied.

1. Has the Nevada Supreme Court Decision "Diminished" the Jurisdiction of the New Hampshire Federal Court?

It is obvious from the statements above, of both the Nevada court and the New Hampshire federal court, that it has not.

Nor is an issue of federal supremacy involved in this case.

Bergeron's Nevada claim was for breach of contract for failure to bequeath the stock of the corporation. His New Hampshire suit, excluding the securities item otherwise disposed of, was for the same breach of contract. The position of the federal court in New Hampshire is exactly the same as that of a state court in New Hampshire. Its powers are dependent upon personal service in New Hampshire or upon the New Hampshire long-arm statute. Federal preemption has nothing to do with this case. It is just the same as if the suit had been brought in the state court of New Hampshire and then removed to the federal court in New Hampshire.

It is axiomatic that the jurisdiction of the federal court in a diversity case is only the jurisdiction and process of the state court in which it is sitting.[3] The conflict, if there is one, is between the State of Nevada and the State of New Hampshire, not with the federal court. The federal supremacy clause is not applicable.

Referring to the cased cited by petitioner:

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[3]The Nevada court spoke in the context of the suit having been filed in New Hampshire. Petitioner's quote on page 15 left out the underlined words: "We simply determined that, *under the circumstances of this case* and as a matter of policy, the Nevada State District Court was the proper, more appropriate court for bringing suit on the claim under NRS 147.130(1). We therefore, deny rehearing on this ground."

Hess v. Reynolds, 113 U.S. 73 (1885) is a case which holds that the federal right of removal from state court to the federal court of the same state cannot be defeated by state law. Such cases are not relevant here. Respondent does not dispute that where federal law grants a right of removal such right exists. (However, Bergeron could not have removed from the Nevada state court to the New Hampshire federal court.)

It was a suit by Hess against the estate of Warren Sherwood. Hess himself brought the suit in the probate court but the law at that time permitted subsequent removal to the federal Circuit Court on filing an affidavit of prejudice. The decision held that the right to remove could not be defeated by state statute. The primary issue was the time when the affidavit might be filed, and whether the statute under which he sought removal was still in force. The case is not pertinent.

Clark v. Bever, 139 U.S. 96 (1891) was a suit by Clark, also brought in state court, against George Green's estate. Clark was a creditor of the Burlington Railroad and claimed that Green owed the railroad because he took stock in settlement of debt the railroad owed Green. Clark claimed that Green, who took the stock for 20% of its face value, owed the corporation the remaining 80% under principles of corporate law, even though the stock was worthless.

Clark, in some way, perhaps like Hess, removed to the federal Circuit Court of the same state. The decision said the removal was proper but Green did not have to pay. Again, this case is authority only for the proposition that a state cannot override the right to remove.

Harrison v. St. Louis and San Francisco Railroad Co., 232 U.S. 318 (1914) was also a same state removal case, holding that Oklahoma could not prevent removal by the railroad company through the device of revoking its charter to do business in Oklahoma.

Chicago & Northwestern Railroad Co. v. Whitton, 80 U.S. 270 (1871) likewise was a same state case, not a probate case, where the wife of the plaintiff was killed crossing the track and the railroad removed to federal court.

Petitioner's next group of cases are more relevant in that they do involve suits where they have been brought by the plaintiff in federal court, rather than removed, but they again all involve same state cases. The suits were brought in the federal court in the same state where the probate was pending.

Markham v. Allen, 326 U.S. 490 (1946) is the leading case establishing the principles where a federal court may or may not involve itself with a state probate proceedings. It will be cited and relied upon later in this brief. It is relevant to the ambit of the so-called probate exception. It is not relevant to the propriety of suit being brought in a federal court of a different state from that in which probate is being had. Markham was the Alien Property Custodian acting under the Trading with the Enemy Act. He brought suit in federal court in California in relation to an estate being administered in the Superior Court of California. The decision was that he was entitled to sue in the California federal court instead of in the California state court.

Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909) shows Mrs. Waterman suing the bank in federal court in Louisiana to determine her interest in an alleged lapsed legacy in an estate being probated in Louisiana. Again, it was a same state case.

Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977), a trademark case against a Lichtenstein corporation, is cited for the proposition that the trial court had jurisdiction to determine its own jurisdiction, which is not an issue here.

Markham v. City of Newport News, 292 F.2d 711 (4th Cir. 1961) where the plaintiff and her vehicle fell into a sewer manhole, said that in determining its own jurisdiction a federal district court must look to the sources of its power.

Of the cases cited in Footnote 7 of petitioner's brief, *Greyhound, Rosenberg* and *Monogram* were same state cases. *U.S. v. Swanson*, same state, was for money loaned by the United States to the decedent, and *U.S. v. Estate of Slate*, same state, was to collect taxes. *Hurlburt* was a same state case. None of these indicate Nevada diminished the jurisdiction of New Hampshire.

The remaining cases cited by petitioner, *Lamberg, Beach, Akin, Rosenberg, Lee* and *Lummis's*, are all also same state cases. The cases in petitioner's Footnote 8 are antitrust or patent, and the Nevada case in Footnote 9, *Federal Savings*, is merely substitution of the executrix for the decedent.

None of the cases cited by petitioner conflict with the right of the State of Nevada to require a suit upon a rejected claim be brought in Nevada.

2. Federal Law Recognizes the Right of the States to Control the Administration of Decedent's Estates.

A. The Probate Exception

The states have the right to determine who shall participate in the distribution of their decedents' estates. They presumably could declare estates forfeited to the crown (a 100% tax), or descend only to the eldest son, or not be subject to the claims of creditors. (Joint tenancy property is not subject to the claims of creditors.)

Nevada has a statutory scheme for distribution of estates. It includes payment of creditors, provided they file a claim, and, when rejected, sue in "the proper court."

The proper court, Nevada says, is the district court where the probate is pending.

By contrast, the laws of some other states impose no statutory restriction on the place where suit must be brought. Nevada, however, does; perhaps that attention to detail, among others, accounts for Nevada estates being expeditiously administered.

Is that requirement unconstitutional or even unreasonable? The New Hampshire federal court obviously does not think so. In its Order of December 11, 1984, which denied reconsideration of the judgment entered against Bergeron, October 12, 1984, it said:

> "The continued exercise of concurrent jurisdiction would substantially interfere with the strong state policy in the orderly administration of estates and trusts. *Markham v. Allen,* 326 U.S. 490 (1945); *Waterman,* supra; *Buck v. Hales,* 536 F.2d 1330 (10th Cir. 1976), (administration of a trust)." Respondent's Appendix D, page A-12

* * *

> "The exercise of federal review would also disrupt the Nevada efforts to establish coherent public policy on the definition of 'proper court' for filing probate claims, *Bergeron v. Loeb*, supra; *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)."Ibid., page A-12

Markham v. Allen, supra, the California Alien Property Custodian case, is the landmark case stating that federal courts of equity (same state) have jurisdiction to entertain suits in favor of creditors

> "so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."

In the instant case, adjudication in New Hampshire of Bergeron's claim against the estate would interfere with the probate proceeding as established by Nevada law. It also would assume control of the property in the custody of the state court.

Bergeron's creditor's claim, Appendix A, was for a pro rata share of the actual stock of the company. His suit sought to "return the stock to Loeb's estate for distribution to Bergeron and the class he represents." Petitioner's Footnote 1, page 5. This would be an assumption of control of the property in the custody of the state court. *Ewald v. Citizens Fidelity Bank & Trust Co.*, 242 F.2d 319 (6th Cir. 1957).

Bergeron's suit was for equitable relief and for recovery of the stock itself. There was no suit for money damages as Bergeron's brief, page 12, asserts, referring to "his prayer for money damages." There is no prayer for money damages. See petitioner's Appendix E, page 82, and prayers to the previous counts.

The oft-quoted statement from *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), is that where the judgment is strictly in personam, both state and federal court may proceed until judgment is obtained in one of them. But if the two suits are in rem so that the court has possession or must have control of the property, to grant the relief sought, the jurisdiction of one court must yield to that of the other. The principle applicable to both federal and state courts is that the court first assuming jurisdiction over the property, may maintain and exercise that jurisdiction to the exclusion of the other. The doctrine is necessary to the harmonious cooperation of federal and state tribunals.

Here, the stock is, and throughout the entire period of time referred to, has been, within the in rem jurisdiction of the Second Judicial District Court of the State of Nevada. It also was the first court to have jurisdiction in

this case, even in personam jurisdiction over Bergeron when he filed his claim. It therefore should be the forum for resolution of the dispute, which, as pointed out above is for ownership of the stock.

The *Princess Lida* case states that the doctrine has no application to a case where the plaintiff seeks merely adjudication of his right or interest as the basis of a claim against *a fund* in the possession of an estate. Bergeron's claim is not a mere claim for an interest in a fund—he is claiming the res—the stock.

In the case of *U.S. v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), the United States filed suit in federal district court claiming ownership of a fund, which was currently under the jurisdiction of the State Court of Appeals and being administered by a state court appointed agent. Both courts sought to establish jurisdiction of the res. The Supreme Court rejected the government's argument that the suit in the federal district court was one in personam because the government demanded that the court appointed agent pay over to the United States the entire amount of the fund. The court concluded at page 478 that: ". . . the object of the suit is to take the property from the depositories and from the control of the state court and to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings." Accordingly, where the party seeks ownership and possession of the entire res, the suits are in rem, and the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought.

In the case at bar, petitioner in his complaint prays for an order vesting title of the Union Leader Corporation stock in the name of plaintiff and other employees of the corporation and to transfer and deliver to plaintiff

and all employees of the corporation their respective proportionate shares of ownership of the stock. Petitioner's demand, therefore, is equivalent to the government's demand in the *U.S. v. Bank of New York & Trust Co.* case, which makes this action one in rem, and subject to the jurisdiction of the State Court of Nevada which exercised control over the res.

Nevada probate proceedings are in rem proceedings. NRS 136.010. See generally Bancroft's Probate Practice Sec. 40 (2nd ed. 1950). When the notice provisions of the probate statutes are complied with, " . . . the entire world is called before the court, and the court acquires jurisdiction thereby over the estate and over all persons for the purpose of determining their rights to any portion of the estate . . . " *Monk v. Morgan*, 192 P.1042, 1044 (1920); Bancroft's Probate Practice, supra, Sec. 61. Every person interested in an estate, including a creditor, is a party to the proceeding, and the action of the court, whether he appears and presents his claim or not, is equally conclusive upon him. *Monk v. Morgan*, supra.

Rice v. Rice Foundation, 610 F.2d 471 (7th Cir. 1979), noted that the probate exception is a serious question of subject matter jurisdiction, and pointed out that applying the principle to a particular set of facts is not easy. Here, particular facts are:

A. Bergeron submitted to the jurisdiction of the Nevada district court when he filed his claim and has been vigorously litigating there ever since.

B. Nevada has a strong public policy for rejected claims to be resolved in the district court where the probate is pending.

C. It is a sound policy and an integral part of the estate distribution scheme.

D. The res is Nevada.

E. Jurisdiction first attached in Nevada.

Therefore, respondent submits that the situation presented by this particular case is within the probate exception.

Referring to petitioner's additional cases: in *DiTinno*, Massachusetts abstained; in *Farrell*, this court affirmed a decision that the probate exception applied.

In *Looney v. Capital National Bank*, 235 F.2d 436 (5th Cir. 1956), the question was the validity of a trust, and the court said, where the state court of general jurisdiction was granted the power to determine inter partes, the validity vel non of provisions of a will, "a United States court in that state has jurisdiction to entertain such an action . . . so long as it does not interfere with the administration of the estate in a state court." Note that the court said a United States court *in that state*. It cited *Simlar v. Wilson*, 210 F.2d 99, which also expressly said "in that state."

Holt was quiet title; *Anderson* was a reciprocal will; *Brownell* denied an attempt to reopen a probate; *Blakeman* was mismanagement of a corporation; *Quinlan* a void will.

None of these cases are close enough factually to affirm or deny the probate exception here.

In *Rice v. Sayers*, 198 F.2d 724 (1952), another 10th Circuit decision, Kansas had a statute which vested exclusive jurisdiction of actions to contest wills in the state probate court; because it was a probate court, and not a court of general jurisdiction, the circuit court ordered the action dismissed with prejudice. Respondent thinks that the name of the court should not make a difference. If a state declares that a specific court has exclusive jurisdiction to make a specific determination in respect to a rejected probate claim, should not that be enough to require the claimant to sue in that court?

Respondent submits that whether it be termed the probate exception, an election of forum, jurisdiction of res, or first attachment of jurisdiction, that it was not unconstitutional to require Bergeron to proceed in the Nevada district court.

In *DeWitt v. Duce*, 675 F.2d 670 (5th Cir. 1982), plaintiff filed a diversity action for wrongful interference with inheritance. The district court dismissed for lack of subject matter jurisdiction because the case dealt with state probate matters. The circuit court reversed and remanded. On remand, the district court held that plaintiffs were precluded by Florida law. On appeal, the circuit court certified the question to the Supreme Court of Florida — did Florida law preclude plaintiffs from proving tortious interference where plaintiffs had notice of the probate proceeding and an opportunity to contest the validity of the will but chose not to do so?

The Supreme Court of Florida answered that plaintiffs had an adequate remedy in probate court for their grievance with fair opportunity to pursue it and were barred by Florida law from a subsequent action. The circuit court then held that the district court had properly dismissed the action.

So, here, Bergeron had an adequate remedy in the Nevada probate court and a fair opportunity to pursue it. By Nevada law, he was barred from subsequent action. The Nevada decision should stand.

B. Abstention

The citations show that the federal court has ample precedent and reason to abstain. *Rice v. Rice Foundation*, supra; *Bassler v. Arrowood*, 500 F.2d 138 (8th Cir., 1974).

If the abstention doctrine requires clarification, that should come in an appeal from a federal court decision, not here.

CONCLUSION

Therefore, respondent submits that Nevada has not diminished the jurisdiction of the federal court in New Hampshire; that the power of the New Hampshire federal court is derived from the state law of New Hampshire with the diversity element only incidental; that there is no supremacy issue in this case between federal and state court; that the Nevada requirement that suit upon a rejected claim be brought in the district court in Nevada is constitutional under the facts of this case.

No "first raised" arguments are made in this Brief in Opposition.

Respondent submits the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PRINCE A. HAWKINS
HAWKINS, RHODES & SHARP

RALPH WARREN SULLIVAN
MALLOY AND SULLIVAN

Attorneys for Respondent
Nackey S. Loeb,
Executrix

January 1985

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

In the Second Judicial District Court

Of the State of Nevada, in and for the County of Washoe.

No. 81-10236

Dept. No. _____

IN THE MATTER OF THE ESTATE OF

WILLIAM LOEB

Deceased.

Petitioner's Ex. A For Ident.

'82 MAR 17 P2:27

BY _____ DEPUTY

GENERAL CLAIM

Claim of Richard R. Bergeron, RFD 2, Danis Park Road, Goffstown, N.H. 03045
NAME ADDRESS

The undersigned creditor of the above-named deceased presents this claim against the deceased, a statement of which is hereto annexed, marked "A".

		$
See Attachment "A"		
Market Value of Union Leader Corp. a/o 9/13/81	divided by:	Total number of ULC full-time common law employees a/o 9/13/81
or alternatively		
Total issued and outstanding shares of Union Leader Corporation	divided by:	Total Number of Union Leader Corporation common law employees a/o 9/13/81

STATE OF ~~NEVADA~~ NEW HAMPSHIRE
COUNTY OF ~~WASHOE~~ HILLSBOROUGH } SS.

The undersigned, being duly sworn, says: that he is the undersigned creditor named in and who makes the foregoing claim against the estate of WILLIAM LOEB, deceased, that the amount of said claim, to wit: the sum of [See above] ~~DOLLARS~~, is justly due to said claimant; that no payments have been made thereon which are not credited, and there are no offsets to the same to the knowledge of this affiant; that affiant has personal knowledge of all the facts of said claim.

Richard R. Bergeron

My Commission Expires:
August 27, 1985

Subscribed and sworn to before me this 16th day of March, 19 82

~~NOTARY PUBLIC~~ Notary Public

~~IN AND FOR~~

The within claim is _____ APPROVED/DISAPPROVED this _____ day of _____, 19____.

EXECUTOR OR ADMINISTRATOR

Allowed and approved for $ _____ this _____ day of _____, 19____.

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: December 28, 1984

JUDITH [illegible]AIN, Supreme Court Clerk,
State of Nevada

By Joanne C. Dilard Deputy

ATTACHMENT "A"

The deceased, William Loeb, was sole owner and shareholder of the Union Leader Corporation, incorporated and doing business in the State of New Hampshire. On numerous occasions and to induce the loyal service of myself and other employees of his company, the deceased repeatedly stated that, upon his death, ownership of the company would be divided among and devised to its then employees who were such as of his death.

As of September 13, 1981, the date of Mr. Loeb's death, the undersigned was a full time employee of the Union Leader Corporation and entitled to receive a pro rata share of the company, or its cash equivalent, as a creditor of the decedent's estate. Although the undersigned cannot state the specific dollar value of this claim, my rightful share of ownership of the Union Leader Corporation can be expressed as follows:

Market Value of Union Leader Corp. a/o 9/13/81	divided by:	Total number of ULC full-time common law employees a/o 9/13/81

or alternatively

Total issued and outstanding shares of Union Leader Corporation	divided by:	Total Number of Union Leader Corporation common law employees a/o 9/13/81

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.
DATE: July 14, 1982
[illegible], Clerk of the Second Judicial District Court, in and for the County of [illegible], Nevada.
By [illegible] Deputy.

Richard R. Bergeron

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.
DATE: December 28, 1984
JUDITH FOUNTAIN, Supreme Court Clerk, State of Nevada
By Joann C. Richards Deputy

No. 81-10236
Estate of
Lillian Robb
Tarrant

Admitted to Probate
JUDY BLEVINS, CLERK
BY [signature]
DEPUTY

116th YEAR — NUMBER 43 — 48 PAGES

5-

An Editorial

For the Future

In considering the future, it has always been the overwhelming desire of this Publisher that the Union Leader continue for many decades more its battle and fight for the rights of ALL the people — and not to be the voice of any special interest or of any political party.

The second desire of this Publisher, looking into the future, has always been that the people associated with this paper, who have worked to produce it every day and whose leadership and devotion to the paper have made it the great institution that it is, should be protected in the future, when this Publisher is no longer around.

In order to achieve these two objectives, the Publisher of this paper has made a will which provides that on his death the paper will go to a trust whose sole trustee, while she is alive, will be the Publisher's wife, Nackey Scripps Loeb.

AN EDITORIAL Page 24

An Editorial

For the Future

(Continued from Page One)

After her death, or if both the Publisher and his wife should be killed in a common disaster, as almost happened on Washoe Hill in Nevada just before Christmas last year, the trustees running the trust will be some of the men presently involved in the management of the newspapers.

These trustees will operate the paper and have complete control of it. All profits beyond expenses will be shared with the employes in proportion to their salaries, multiplied by the number of years that they have been with the paper.

The trust will continue until the last one of the trustees appointed by the Publisher dies.

At that point, the trust will be dissolved and the stock of the newspaper distributed to the then employes of the paper — again in proportion to their own salaries multiplied by the period they have been with the paper.

Considering the fact that some of the trustees are in their early thirties, this event should not occur, barring a universal disaster, for another 40 years or more. At that point, anyone who is now alive and thinks he can predict the future is conceited beyond belief!

However, as this Publisher has said, it is his hope that this paper in the next 40 years will continue to serve only the interests of the people, without fear or favor. We hope it will also be a credit to our God and our country, and of course, especially to the State of New Hampshire.

William Loeb

William Loeb, Publisher

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: December 28, 1984
JUDITH FOUNTAIN, Supreme Court Clerk,
State of Nevada
By Jeanne S. Richards Deputy

81-10236
Estate of
William Loeb
Petitioner

Admitted 7/20 19 83
JUDITH FOLEY, CLERK
BY J. Denham
DEPUTY

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APPENDIX C

United States District Court for the
District of New Hampshire
Civil Action No. 82-317-L

Richard R. Bergeron
v.
Estate of William Loeb
The William Loeb Union Leader Trust
Nackey S. Loeb, individually as Executrix
of the Estate of William Loeb,
and as Trustee of The William Loeb
Union Leader Trust and the
Security National Bank of Nevada

JUDGMENT

In accordance with the granting of Defendants' Motion To Dismiss and Motion for Summary Judgment on October 12, 1984 by the Honorable Martin F. Loughlin, United States District Judge, judgment is hereby entered.

By the Court,
KATHLEEN NORTHRUP
Clerk

October 12, 1984
cc: Alan P. Cleveland, Esq.
Ralph Warren Sullivan, Esq.

APPENDIX D

The United States District Court For The
District of New Hampshire

C82-317-L

Richard R. Bergeron, et al.

v.

Estate of William Loeb, et al.

ORDER ON MOTION FOR CLARIFICATION

The United States District Court for the District of New Hampshire granted defendants' motions to dismiss and summary judgment on October 12, 1984. The plaintiffs' motion for reconsideration and oral motion to hold in abeyance are denied. The motion for clarification is granted.

William Loeb died on September 13, 1981. Nackey S. Loeb, his wife, was appointed executrix of his estate and trustee of the "Union Leader Trust" (trust) pursuant to the probate by the State of Nevada.

Under Nevada probate procedures, a general claim was made by the plaintiff class against the estate and trust which involved 3,750 shares of the Union Leader Corporation stock (the securities). These shares of stock were under the jurisdiction and possession of a Nevada probate court.

Nackey Loeb rejected the claim on April 5, 1982. Rather than following the procedures of Nevada to request a hearing before the probate court, the plaintiffs instigated suit on June 7, 1982 in this district court, referred to as the federal court.

The suit was certified as a class action on behalf of willing employees of the Union Leader Corporation as of September 13, 1981.

The complaint is summarized as follows:

Count I alleges fraudulent conduct on the part of all defendants in the purchase and sale of the Union Leader Corporation securities by means of interstate commerce. The conduct violates the Securities Exchange Act of 1934, as amended (the "Exchange Act"), 15 U.S.C. §§ 78 et seq., and Rule 10(b). As such, the court has jurisdiction under 28 U.S.C. § 1331.

Count II alleges a breach of common law contract in the failure by the defendants to perform an agreement to transfer the ownership of the securities upon the death of William Loeb.

Count III alleges a violation of the New Hampshire Uniform Fraudulent Conveyance Act, RSA 545:1 upon the *inter vivos* transfer of the securities to the trust on August 17, 1979.

Count IV alleges the pledge of the securities to the Security National Bank (SNB) on August 25, 1980 was fraudulent conveyance and that the Bank was a party to the fraud.

Count V alleges that Massachusetts law and not the Nevada community property rules applied, that the Second Amendment to the trust was invalid, that the amendment was made to defraud the employee-creditors and that the execution of the amendment was therefore a fraudulent conveyance of a half interest in the securities to Nackey Loeb.

Counts II through V are properly before the court there being diversity of citizenship among the parties. 28 U.S.C. § 1332. The plaintiff also seeks a declaration of rights. 28 U.S.C. § 2201 et seq.

After this court received the complaint, Nackey Loeb filed a "Petition for Declaration of Rights and for Judgment that Creditors' Claim is Barred" in the Second Judicial Court in the State of Nevada in and for the County of Washoe (Nevada Court). The defendant there, Plaintiff Bergeron, et al here, submitted to the jurisdiction of the Nevada court and answered the complaint on June 28,1982. As a result of that action, the Nevada court rules that the same claim as made in this federal court was forever barred. The Nevada Supreme Court affirmed the Nevada District Court. *Bergeron v. Loeb,* Slip opinion No. 14465. (Nev. January 25, 1984), reh. denied, October, 1984.

In light of the Nevada final judgment on October 4, 1984, this court granted defendants' motion to dismiss based upon the abstention doctrine. This court also granted defendant's motion for summary judgment on the "Exchange Act" count I of the complaint, (Order dated October 12, 1984). This court had held the matter in abeyance pending the request for rehearing pending before the Nevada Supreme Court from June 16, 1984.

The claims set forth in Counts II, III, IV and V are ones which this court had concurrent jurisdiction with the Nevada courts' proceedings.

The United States Supreme Court has recently reaffirmed the discretionary power of the district courts to dismiss an action to avoid concurrent jurisdiction which would conflict with comity. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, (1983); *Moses H. Cone, Meredith v. City of Winter Haven,* 320 U.S. 228, 234 (1943).

Under the so-called exceptional circumstances test,

> [t]he decision whether to dismiss a federal action because of parallel state court litigation does not rest on a mechanical checklist, but on a careful balancing

> of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.

Moses H. Cone, Supra, at 16. Upon a balancing of the factors, the court finds several grounds which favor the application of abstention.

The allegation contained in plaintiff counts II, III, IV and V are claims which were litigated or which could have been litigated by affirmative defenses or cross claims in the Nevada "Declaration of Rights" proceedings. As of the date of this order, a final judgment has been rendered by the Nevada Supreme Court. *Bergeron v. Loeb, supra.*

> The declaratory judgment entered by the state chancery court has the force and effect of a final judgment and is binding upon the parties in subsequent actions.

Continental Insurance Company v. South Jersey Gas Co., 409 F. Supp. 1130, 1132 (D.N.J. 1976).

If a Writ of Certiorari to the United States Supreme Court is not brought, is denied, or is affirmed the Nevada decision would have a *res judicata* effect on this court.

> The outlines of the rule are clearly set forth in *Commissioner v. Sunnen,* 333 U.S. 591, 68 S. Ct. 715, 92 L.Ed. 898 (1947):
>
> > The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. (Citations omitted).

Walsh v. International Longshoreman's Ass., AFL-CIO, 630 F.2d 864, 867 (1st Cir. 1980). That judgment states that

the creditor's claim by Bergeron is forever barred against the estate and trust. Thus, if the decision is respected by this federal court, the claims are moot.

In light of the likelihood that the issues before the court are moot, the continued exercise of jurisdiction would waste judicial resources. *Moses H. Cone, supra.*

If this court does give *res judicata* effect to the Nevada judgment, this action would cause piecemeal adjudication of the rights to the estate and trust of William Loeb. *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), *(Colorado River).* Probate and trust administrations are fields which are "peculiarly appropriate for comprehensive treatment in the forums having the greatest experience and expertise". *Id* at 819-20. Piecemeal adjudication should be avoided here.

The continued exercise of concurrent jurisdiction would substantially interfere with the strong state policy in the orderly administration of estate and trusts. *Markham v. Allen,* 326 U.S. 490 (1945); *Waterman, supra; Buck v. Hales,* 536 F.2d 1330 (10th Cir. 1976), (administration of a trust). The pending suit would affect the bulk of the assets of the estate and the entire corpus of the trust. Count V contests the validity of a trust instrument and choice of law selected by the Nevada courts. Clearly, the federal suit amounts to an examination of the general administration of estates and trusts by the Nevada courts which this court declines to do. *See, Kittrege v. Stevens,* 126 F.2d 263, (1st Cir. 1942).

The exercise of federal review would also disrupt the Nevada efforts to establish a coherent public policy on the definition of a "proper court" for filing probate claims. *Bergeron v. Loeb, supra; Burford v. Sun Oil Co.,* 319 U.S. 315 (1943).

The conflicts with comity and avoidance of piecemeal litigation are not avoided if this court restricts its judgment to a declaration of rights. Where a prayer for injunctive relief is not premature, claims pursuant to the Declaratory Judgment Act are decided by the same standards as those for claims based on diversity of citizenship. *PBG Industries, Inc. v. Continental Oil Co.*, 478 F.2d 647, 679 (5th Cir. 1973). As an injunction is not premature and the issues of the case are ripe, the court may properly abstain.

The court now turns to count I of the complaint. Abstention does not apply because the federal courts have exclusive jurisdiction of Security Exchange Act claims. 15 U.S.C. § 78 aa. A review of the pleadings, affidavits and all other papers filed with the court indicate the following facts and reasonable inferences in a light most favorable to the non-moving party. *Pignons S.A. de Mecqnique de Precision v. Polaroid Corporation*, 657 F.2d 482, 486(1st Cir. 1981).

On April 29, 1949 William Loeb was the sole owner of 5,000 shares of Union Leader Corporation stock (Corporation), representing the entire authorized and issued capital stock of the Corporation.

In 1949 William Loeb started the cash profit-sharing plan covering the Corporation employees. The plan provided for 50% of the Corporation's profits before taxes to be annually distributed among the employees.

On September 26, 1956 William Loeb created the retirement profit sharing plan and trust for the benefit of employees (called deferred profit sharing plan).

On September 30, 1956 through July 17, 1960 William Loeb sold 1,250 shares of corporation stock to the deferred profit sharing plan for $375,000 in cash from the plan.

In 1957 William Loeb founded the *Haverhill Journal.* The employees agree to Loeb's request to terminate the 1949 cash profit sharing plan. Between 1949 and 1957 the employees received $696,472.81 from this plan. In exchange Loeb promised the employees that they would receiv ownership of the Corporation upon his death. Loeb reaffirmed this promise of Corporate ownership when he extracted promises of loyalty, forebearance from seeking overtime pay, higher wages and compensation and benefits from the employees during the Haverhill venture.

In 1959 William Loeb retroactively deleted the mandatory payment contributions in the deferred profit sharing plan and stopped payments. Between 1956-1957 the plan accumulated $270,000 in the employees' individual accounts. Loeb told the employees this money would be returned to them when they received ownership of the Corporation because every $1.00 used to finance the Haverhill paper, rather than being put into the deferred profit sharing plan could be expected to increase $40.00 in value.

On May 1, 1959 William Loeb pledged to Alexander R. Cymrot a Director of the Corporation, all Corporation stock held in Loeb's name as collateral for a $300,000 loan. An additional borrowing of $200,000 by the Corporation from Cymrot is evidenced by loan agreements dated June 1, 1959 and June 1, 1960.

On April 8, 1963 William Loeb borrowed $500,000 from the Teamsters Central States, Southeast and Southwest Areas Pension Fund (Teamsters) to repay Cymrot. Loeb pledged 3,750 shares of the Corporation owned by him and not held in trust by the deferred profit sharing plan.

June 25, 1965, William Loeb borrowed $2,000,000 from the Teamsters to repay the 1963 loan. Loeb pledged

all Corporation stock held by him as shareholder of record.

On March 7, 1979 the Corporation borrowed $900,000 from the Security National Bank of Nevada (SNB) to pay the 1965 Teamsters loan. William Loeb regained possession of the 3,750 shares of Corporation stock.

On August 17, 1979 William Loeb created the William Loeb Union Leader Trust (Trust). Nackey Loeb was appointed sole trustee. Ten successor trustees were also appointed and after the death of the next to last survivor of the successor trustees the employees will receive ownership of the Corporation. William Loeb transferred all his 3,750 shares to the Trust.

On August 25,1980 William and Nackey Loeb and the Trust pledged the 3,750 shares to SNB for a $2,000,000 loan. This money was used to buy 1,250 Shares of Corporation held by Augsbury Organization, Inc. Upon receipt of the 1,250 shares they were retired by Loeb as Treasury stock.

On September 13, 1981 William Loeb died. Since May 1, 1959 until this date, excluding August 17, 1979—August 25, 1980 all 3,750 shares of Corporation stock held by William Loeb remained pledged and were physically possessed by third party creditors and/or the Corporation.

September 13, 1981 the trust pledged 3,750 shares of Corporation stock to SNB.

The standard for summary judgment utilized in the First Circuit is derived from *Astra Pharmaceutical Corp v. Beckman Instruments, Inc*, 718 F.2d 1201,1204 (1st Cir. 1983). If the pleadings depositions, answer to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Pignons S.A. de Mecanique*

de Precision v. Polaroid Corporation, 657 F.2d 482, 486 (1st Cir. 1981). A dispute of fact is material if it "affects the outcome of the litigation" and is "genuine if manifested by substantial evidence going beyond the allegations of the complaint. *Pignons* 657 F.2d at 486, *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S. Ct. 1495, 47 L.Ed.2d 54 (1976).

In order to maintain an action under Section 10(b) of the Exchange Act, 15 U.S.C. § 78 (aa) as amended, Rule 10 b-5 and 17 C.F.R. § 240.106-5, the plaintiff must demonstrate that the fraud alleged was directly associated with a "purchase or sale of securities". *Rodriguez Cadiz v. Mercado Jimenez*, 579 F. Supp. 1176, 1179-80 (D.P.R., 1983).

The plaintiff alleges that the class of employees were beneficiaries of a constructive trust or that they were entitled to specific perfomance of an oral promise to deliver ownership of the shares in question upon the death of William Loeb. By analogy, the emplyees would be in the same position as employees under a formal, non-contributory pension plan or employee stock ownership plan. In either case, the employer-manager would owe a duty to the employees according to the terms of the agreement. See 56 C.J.S. § 169.

The law is well-established that the Exchange Act does not apply to non-contributory, compulsory pension plans, or to employee stock ownership plans. Generally, the courts have found that there is no affirmative investment decision and no furnishing of "value" by the employees. *Bauman v. Bish*, 571 F. Supp. 1054, 1064 (N.D. W. Va., 1983). The United States Supreme Court stated in *International Brotherhood of Teamsters v. Dainel*, 439 U.S. 551, 560 (1979) that the establishing of a right to the stocks by the faithful service of employees is not a "purchase or sale". The court said:

> Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits. He surrenders his labor as a whole, and in return receives a compensation package that is substantially devoid of aspects resembling a security. An employee is selling his labor primarily to obtain a livelihood, not making an investment. 439 U.S. at 560.

439 U.S. at 560.

The plaintiff's claim against the defendants concerning the use of the stock as collateral for a loan from the Security National Bank of Nevada (SNB) and the Teamster loans must also fail because there was no violation of the Securities Act in those transactions.

> The purpose of §10(b) and Rule 10b-6 is to protect persons who are deceived in securities transactions—to make sure that buyers of securities get what they think they are getting and that sellers of securities are not tricked into parting with something for a price known to the buyer to be inadequate or for a consideration known to the buyer not to be what it purports to be . . . The Act and Rule impose liability or a proscribed act in connection with the purchase or sale of a security; it is not sufficient to allege that a defendant has committed a proscribed act in a transaction of which the pledge of a security is a part.

Chemical Band v. Arthur Anderson & Co., 726 F.2d 930, 943 (2nd Cir. 1984). There is no evidence that SNB or the Teamsters were defrauded because the equitable lien in favor of the employees was not disclosed, in which case only SNB and the Teamsters would have standing as an aggrieved party. *Wright v. Heizer Corporation*, 411 F. Supp. 23, 31-33 (N.D. Ill. E.D., 1975).

The Securities Acts were not intended to be vehicles for attacking fraudulent mismanagement of corporate affairs, a pension plan or trust, but rather were established to protect defrauded purchasers and sellers of securities. *Birnbaum v. Newport Steel Corp.*, 193 F. 2d 461 (2nd Cir. 1952); *cert. denied* 343 U.S. 945 (1952). The 1979 transfer of shares to the William Loeb Union Leader Trust would amount to fraudulent mismanagement because the shares were placed in an irrevocable trust contrary to the original alleged agreement conferring the corporation's ownership to the employees until William Loeb's death. The existence of the trust virtually places corporate ownership out of plaintiff's reach and similarly situated employees' reach. However, even granting that this is mismanagement of a trust, the fraudulent transfer is not a purchase or sale and does not qualify as a cause of action under the Securities Act.

The motion to dismiss shall stand for the counts II through V based upon abstention. Upon a careful review of facts and allegations connected with Count I under the "Exchange Act", motion for summary judgment in favor of the defendant remains.

So Ordered.

December 11,1984

/s/ MARTIN F. LOUGHLIN
Martin F. Loughlin
U.S. District Judge

Alan P. Cleveland, Esq.
Ralph Warren Sullivan, Esq.